IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. ~~1846~~ 70-82

UNITED STATES OF AMERICA,
Appellant,

vs.

TOPCO ASSOCIATES, INC.,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

MOTION TO AFFIRM.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

MOTION TO AFFIRM.

Pursuant to Rule 16 of the Rules of this Court, appellee, Topco Associates, Inc., moves that the judgment of the district court be affirmed.

STATEMENT OF THE CASE.

This is a direct appeal from a final judgment of the district court in a civil antitrust action brought by the government. 319 F. Supp. 1031 (N. D. Ill. 1970). The complaint charged that Topco Associates, Inc. (hereinafter "Topco"), a cooperative grocery buying organization, violated Sec-

tion 1 of the Sherman Act by means of a combination and conspiracy with its members whereby they were licensed to sell Topco branded products only within their respective marketing areas.

After a full trial on the merits the district court ruled the government "failed to establish a violation of Section 1 of the Sherman Act" and determined that the relief sought by the government "would not increase competition in Topco private label brands but would substantially diminish competition in the supermarket field" (Conclusion of Law 5; Opinion, p. 11a).[1] Judge Will concluded that Topco's licensing provisions contribute to competition rather than detract from it:

> The Topco licensing provisions are not inherently unreasonable and have no substantial adverse effect on competition in the relevant market. They are ancillary and subordinate to the fulfillment of the legitimate, pro-competitive purpose of the Topco cooperative, reasonable and in the public interest. (Conclusion of Law 4.)

The district court therefore entered judgment for Topco on November 16, 1970 and dismissed the complaint. It is from this judgment that the government appeals.

1. Citations to the opinion of the district court refer to pages of Appendix A to Appellant's Jurisdictional Statement; citations to Findings of Fact and Conclusions of Law of the district court refer to paragraph numbers (pp. 11a-27a of Appendix A to the Jurisdictional Statement). "DX" refers to defendant's exhibits; "Tr." refers to trial transcript.

GROUNDS FOR AFFIRMANCE.

The judgment below should be affirmed for the following reasons:

1. The government failed to prove that the licensing provisions of the Topco cooperative resulted in any actual or substantial restraint of trade in violation of the Sherman Act.

2. The decision of the district court applies the well-established antitrust doctrine of ancillary restraints and reflects no novel principle of law.

3. This case is particularly appropriate for summary affirmance because it reflects application of recognized legal principles to limited competitive circumstances. Thus, the decision is narrow in scope, yet it is important to small businesses because it permits them to effectively compete with the giant firms, to the ultimate benefit of the consumer.

FACTUAL STATEMENT.

I. DESCRIPTION OF TOPCO.

Topco is a cooperative buying organization owned by its members. Topco membership at the time of trial consisted of twenty-five small or medium sized independent firms engaged primarily in the retail sale of grocery and related non-food products. (Findings 1, 2, 4; Opinion, p. 2a.)[2]

Topco is successor to Food Cooperative, Inc., founded in 1944 by a small group of local grocery chains scattered

2. Two Topco members are themselves retailer-owned-cooperatives (Finding 3).

about the country. These firms were compelled to obtain merchandise under private labels to survive in competition with the national and large regional supermarket chains which had developed their own private label programs. The only way that these and other firms could obtain a private label program reasonably competitive with the large chains was to affiliate in a buying organization such as Topco. The continuing purpose and function of Topco is to provide its members with an effective and cost competitive private label program which they are unable to obtain independently. (Findings 1, 8, 13, 34, 55; Opinion, p. 10a.)[3]

The members of Topco are distinct and separate businesses, dispersed across the country and located in essentially different geographic markets. Each member operates in competition with one or more of the national and large regional chains as well as with numerous other chains and independents. There is no pooling of earnings or profits, capital, management, or advertising and promotional resources; each member succeeds or fails as a separate entity. Each purchases merchandise as it wishes and from whom it pleases, selects the number and types of products it chooses, follows its own merchandising philosophy, prices merchandise as it wishes, and adopts its own advertising and promotional strategies. Each, as the district court specifically found, exercises independent discretion as to the location and number of stores it will operate. (Findings 2, 3, 13, 46.)

3. Private label merchandise in the food industry is generally defined as a product sold under a trademark or brand owned by a distributor (wholesaler or retailer). The distributor rather than the manufacturer generally takes responsibility for (1) establishing product specifications; (2) establishing a source of supply; (3) quality standards and control; (4) packaging design and procurement; (5) physical movement from production to the distribution warehouse; (6) pricing and promotion; and (7) success of the product (Finding 24(b)).

Topco membership is not static; new members are constantly sought, and older members withdraw. Membership in Topco is for most companies a stage in their economic growth. They join Topco because of their competitive need for an efficiently procured private label program. They grow during, and as a result of, their membership in Topco. When they grow to sufficient size to support their own private label program, they leave Topco. (Findings 54, 55; Opinion, pp. 3a, 9a.)

II. PRIVATE LABEL IN THE FOOD INDUSTRY.

As the district court recognized, the competitive necessity for the practices here attacked by the government is clear when examined in the context of the structure, development and operation of the food industry and the marketing of private label products within that industry (Findings 19-35; Opinion, pp. 2a-4a).

Private label development in the food industry followed the chain store movement, which, led by The Great Atlantic and Pacific Tea Co., transformed the industry from one of small family businesses to one of large concentrated commercial enterprises. The largest chains have continued to dominate the industry and set the competitive pace. In 1967 the twenty-five largest food chains represented 84.6% of total food chain sales. These large multiunit operations have been able to achieve very significant advantages over smaller operators both in purchasing and distribution functions. (Findings 19, 20, 22.)

Perhaps the most competitively significant advantage of the national mass merchandisers is the private label. The largest chains, A & P, Kroger, Safeway and National Tea, were pioneers in this development and each established extensive lines of private label products. These chains arranged for their own sources of supply and fre-

quently themselves engaged in manufacturing. (Findings 23, 29, 31.)

Through use of private label products significant cost economies were achieved in purchasing, transportation, warehousing, promotion and advertising. These economies yielded greater profits and, as the consumer soon recognized, resulted in lower prices on products of high quality. (Findings 24, 25, 28.)

With their own exclusive private label products the larger chains were able to attract a greater volume of trade and build consumer loyalty while increasing profits. Consumer loyalty was established because the store and the line of private labels available there were equated. When a new item was introduced under an established private label, there was a ready consumer acceptance based upon confidence in other items under the same brand. (Findings 24, 29; Opinion, p. 3a.) The private label thus provided the largest chains with imposing competitive advantages. As Judge Will observed, "virtually all of the national supermarket chains have extensive private label programs which are now an almost essential element in supermarket competition" (Opinion, p. 3a).

Private label procurement was beyond the reach of the smaller operators. Independent grocery retailers and wholesalers lost much of their business to the large chains in the early decades of the century, and many did not in fact survive. It was in this context that Topco and other organizations performing similar functions were conceived to provide the independents a means to respond by duplicating some of the economies of scale achieved by their larger rivals and to thereby introduce a countervailing competitive factor into their respective marketing areas. (Findings 22, 26, 34, 55; Conclusion of Law 3.)[4]

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4. These so-called affiliated groups represent 44% of national grocery store sales (DX 1, p. 25).

III. TRADEMARK LICENSING OF TOPCO PRIVATE BRANDS.

Private label is probably the only element of supermarket competition which cannot be precisely duplicated by a competitor and which at the same time produces lower cost for the retailer and guaranteed quality at lower prices for the consumer. Private labels by definition are exclusive to the respective chain; the consumer knows, for example, that she can obtain "Ann Page" brands only at A & P stores. Cooperatively procured private labels must also be "private" to the affiliated members or they will be meaningless as competitive tools. (Findings 24(g), 28, 29; Opinion, p. 3a.)

The trademarks owned by the Topco cooperative were therefore licensed to the members for their respective marketing areas. This permitted each member to make the necessary investment to participate in the cooperative and to establish the cooperative brands as his private labels, just as his larger rivals had done with their own exclusive private labels. Continuous advertising and promotion is required to develop and maintain identification between the Topco private label and the member's stores. A member would not make this investment nor undertake these efforts if others were privileged to trade upon the goodwill thus developed and, in effect, to appropriate his property. The result would be that the Topco brands would cease to serve as the member's private label and become competitively valueless. As the cooperative lost the support of its members, it could no longer continue as a procompetitive factor in the industry. (Findings 30, 32, 35, 36, 43; Opinion, pp. 3a, 4a, 8a, 10a.)

The Topco licensing system in no way restricts a Topco

member to any geographic area. Each member may operate wherever he chooses. If he wishes to sell Topco branded products he may obtain a license to do so. Two or more members may even be licensed in the same area, and sometimes have been, although this could not often occur because the members are geographically so widely dispersed. In fact, Topco members are licensed to sell, and do sell, Topco branded products in all of their retail outlets with few exceptions. In a few instances where members do operate stores located in unlicensed areas such stores, because of the distances involved, cannot be adequately served by the member's warehouse facilities. (Findings 13, 42, 45, 48, 56, 57.)

Topco members expand just as rapidly as their resources permit and they expand whenever and wherever they choose, with as many stores as they wish. Members expand into areas, whether already licensed or not, by obtaining a license and using Topco labels, national brands, packer labels, wholesaler-controlled labels, or other sources of private brands, as their independent discretion dictates. (Findings 3, 42, 45.) As the district court specifically found:

> The Topco licensing system apparently does not have an appreciable influence on the decision of Topco members as to whether or not to expand, or on the rate of their expression . . . (Finding 45).[5]

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5. The government's jurisdictional statement is simply incorrect in its assertion that "expansion into a member's existing territory is, in practice, permitted only by that member's consent . . ." (Juris. Statement, p. 5). The record is clear and the findings unequivocal that each Topco member "exercises independent discretion as to the location and number of stores it will operate" (Finding 3).

ARGUMENT.

I. THE GOVERNMENT FAILED TO PROVE ANY ACTUAL RESTRAINT OF TRADE.

This Court has on numerous occasions stated that a practice which is not inherently unreasonable violates the Sherman Act only if its "effect upon competition in the market-place is substantially adverse."[6] It is not enough that an agreement have only a "remote" or "incidental" effect, but to be reached by the Sherman Act it must have an "appreciable" effect or operate "to restrain commercial competition in some substantial way." *United States* v. *Joint-Traffic Ass'n,* 171 U. S. 505 (1898); *Anderson* v. *United States,* 171 U. S. 604 (1898); *Addyston Pipe & Steel Co.* v. *United States,* 175 U. S. 211 (1899); *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469 (1940).

The burden of proof in establishing that a particular arrangement is an unlawful restraint of trade rests upon the plaintiff. *United States* v. *Arnold, Schwinn & Co.,* 388 U. S. 365, 374 n. 5 (1967). This burden requires more than showing some practice which suggest a "theoretical probability" of restraint. Sherman Act violations, absent specific intent, must be made out upon the realization of restraint, not mere speculation or conjecture. *United States* v. *Container Corp. of America,* 393 U. S. 333 (1968) (concurring opinion); *United States* v. *Columbia Steel Co.,* 334 U. S. 495 (1948); *United States* v. *International Harvester*

6. *United States* v. *Arnold, Schwinn & Co.,* 388 U. S. 365, 375 (1967); *United States* v. *Sealy, Inc.,* 388 U. S. 350 (1967); *Tampa Electric Co.* v. *Nashville Coal Co.,* 365 U. S. 320 (1961); *Appalachian Coals, Inc.* v. *United States,* 288 U. S. 344 (1933); *Chicago Board of Trade* v. *United States,* 246 U. S. 231 (1918); *United States* v. *American Tobacco Co.,* 221 U. S. 106 (1911); *Standard Oil Co. of N. J.* v. *United States,* 221 U. S. 1 (1911).

Co., 274 U. S. 693, 708 (1927); *United States* v. *United States Steel Corp.*, 251 U. S. 417, 444 (1920).

The government failed to sustain this burden. It had sought to show that the Topco licensing provisions inhibited expansion by Topco members, but the district court found the licensing system had no appreciable influence on expansion (Findings 3, 45).

The government also attempted to suggest there might be a diminution in competition within Topco brands, but again failed to prove that Topco's licensing provisions had any actual effect to restrain such competition. In fact, the record is completely devoid of any instance where Topco licensing resulted in the elimination of competition between Topco members. Judge Will explicitly determined that the relief which the government sought "would not increase competition in Topco private label brands . . . ." (Opinion, p. 11a).[7]

The district court also specifically noted the insubstantiality of any *theoretical effect* on competition within Topco brands. He found that all Topco members are medium sized or small regional or local chains, and all compete with outlets of national chains as well as other local and regional chains and independents. Their market shares

7. The district court found "Topco members are scattered across the country and located essentially in different geographic markets of the country" (Finding 13). Any theoretical effect on intra-brand competition thus rests upon a series of only hypothetical and unfounded speculations that one member: (a) might desire to expand into another member's marketing area; (b) might be able geographically to serve such store locations; (c) might be capable of such expansion; (d) might want to market Topco private labels there; (e) might choose to sacrifice the value of his private label in a marketing area where the same private brands were already available from others; and (f) might somehow be refused a license to do so. The Court could not find on the basis of some remote and hypothetical coincidence of these speculations any adverse effect on competition.

ranged from 1.4% to 16.3%, and averaged 5.87%.[8] Moreover, Topco branded products, which represent only 10% of the members' sales, find their competition in generic product categories rather than within Topco brands or with private brands generally. For example, Topco branded canned green beans compete with all other canned green beans regardless of the label, even those within the same store. Within these categories there are vast numbers of labels competing with one another in all markets across the country. (Findings 10, 12, 27; Opinion, p. 9a.) Thus, any imaginary or theoretical effect on competition within Topco brands would be economically insignificant.[9]

Finally, the district court rejected the government's contention that the Topco licensing provisions prevented price competition:

> The Topco licensing provisions do not control or affect prices; Topco members are completely free to

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8. The government points out that the combined total sales of all Topco members represent in excess of $2 billion annually (Juris. Statement, p. 2). Of course, the collective size of Topco members has no competitive significance except with reference to the cooperative's procurement function, and in this regard volume is essential to buy competitively (Tr. 987-990).

9. In *United States* v. *Sealy, Inc.*, 388 U. S. 350 (1967), this Court recognized that competitive impact must be considered. The Court quoted from *Northern Pacific Ry.* v. *United States*, 356 U. S. 1, 6-7 (1958):

> "[I]f one of a dozen food stores in a community were to refuse to sell flour unless the buyer also took sugar—it would hardly tend to restrain competition in sugar if its competitors were ready and able to sell flour by itself." 388 U. S. at 357 n. 4.

Horizontal mergers, for example, completely eliminate competition between the two companies involved, and yet only those mergers the effect of which may be to eliminate "significant" competition constitute a violation of the antitrust laws. *See United States* v. *First National Bank and Trust Co. of Lexington*, 376 U. S. 665 (1964).

sell and do sell Topco-branded products and all other merchandise at whatever price they choose (Finding 46).[10]

Judge Will, therefore, correctly concluded that the Topco licensing provisions have no actual or "substantial adverse effect on competition in the relevant market" (Conclusion of Law 4).

II. THE DISTRICT COURT'S DECISION REPRESENTS NO NOVEL PRINCIPLE OF LAW.

The district court made detailed findings of fact which the government apparently does not dispute in any material respect. (*Cf.* Juris. Statement, p. 10.) These findings led Judge Will to conclude that "the Topco licensing provisions are not inherently unreasonable . . . They are ancillary and subordinate to the fulfillment of the legitimate, pro-competitive purpose of the Topco cooperative, reasonable and in the public interest." (Conclusion of Law 4.) The district court's conclusions of law reflect a proper application of the doctrine of ancillary restraints, well-established by this Court and consistently followed by the lower federal courts.

A. Topco Licensing Must be Tested by Its Market Impact.

The earliest Sherman Act cases recognized that a rigid application of the Act would be unintelligible and unworkable. *Hopkins* v. *United States,* 171 U. S. 578 (1898). "The material considerations therefore turn upon the effects of competition . . . whether they are favorable . . .

10. The government's statement that Topco licensing insulates the price of Topco products is clearly erroneous. (Juris. Statement, p. 10.). In reality there is abundant price competition in food retailing between brands and between stores (Findings 21, 27).

or unfavorable. . . ." *United States* v. *Joint Traffic Ass'n.*, 171 U. S. 505, 575 (1898).

This "standard of reason" requires analysis of the character of the restraint, not in isolation, but in its competitive context. *Standard Oil Co. of N. J.* v. *United States*, 221 U. S. 1 (1911). The rule was given classic expression by Mr. Justice Brandeis in *Chicago Board of Trade* v. *United States*, 246 U. S. 231, 238 (1918):

> . . . the legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.

In applying the Sherman Act through the years this Court has identified certain types of arrangements which on their face demonstrate no purpose but the elimination of competition. These naked restraints are presumed to be illegal because of "their pernicious effect on competition" and "lack of any redeeming virtue." *Northern Pacific Ry.* v. *United States*, 356 U. S. 1, 5 (1958). Accordingly, the *per se* concept has been applied to strike down combinations to fix prices, control markets, foreclose competition, or otherwise act in concert to achieve the paramount purpose or effect of eliminating competition to the injury of the

consumer. The classic cartel cases are illustrative, *e.g.*, *United States* v. *Trenton Potteries Co.*, 273 U. S. 392 (1927); *United States* v. *National Lead Co.*, 332 U. S. 319 (1947); *Timken Roller Bearing Co.* v. *United States*, 341 U. S. 593 (1951).

This Court followed the precedent of the *Timken* case in *United States* v. *Sealy, Inc.*, 388 U. S. 350 (1967), and concluded that the defendant's activities, including "flagrant and pervasive price-fixing," constituted "an aggregation of trade restraints." The Court noted that "the territorial restraints were a *part* of the unlawful price-fixing and policing." 388 U. S. at 356.[11] Mr. Justice Fortas, however, went on to distinguish other "quite different" situations:

> It is argued, for example, that a number of smaller grocers might allocate territory among themselves on an exclusive basis as incident to the use of a common name and common advertisements, and that this sort of venture should be welcomed in the interests of competition, and should not be condemned as *per se* unlawful. But condemnation of appellee's territorial arrangements certainly does not require us to go so far as to condemn that quite different situation, whatever might be the result if it were presented to us for decision. 388 U. S. at 357.[12]

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11. A remarkably similar situation, without the price-fixing aspects, was upheld in *Denison Mattress Factory* v. *Spring-Air Co.*, 308 F. 2d 403 (5th Cir. 1962). The exclusive territory provisions there were upheld because "actuated by" and "incidental to" a "legitimate business justification."

12. In its *Sealy* brief, at 25-26, the government recognized that restrictions may be lawful to achieve a competitively desirable purpose:

> We do not suggest that all restrictive agreements that are illegal per se when considered alone are also illegal per se if adopted in the context of a joint venture. Such agreements may be legal when necessary to further the purposes of a legitimate such venture.

The government here contends that it proved "a classic division of markets by direct competitors," and yet concedes that no decision of this Court prohibits the practices in issue. (Juris. Statement, compare p. 8 with p. 9.) Moreover, the district court concluded that the Topco licensing practices did not constitute a pervasive scheme to carve up the countryside and allocate markets for the purpose of eliminating competition. Topco was created and functions for the purpose of providing its members with an effective merchandising tool, the private label, which they could not alone attain.[13] The district court determined that the Topco licensing system is reasonably related to this purpose and that its effect is substantially to increase, rather than diminish, competition. (Findings 8, 34, 58; Conclusions of Law 3, 4; Opinion, p. 11a.)[14]

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13. Considering the structure of the market and the small proportion of total grocery sales represented by the founding, indeed the present, Topco members, it is unreasonable and unfounded to attribute to them any intention to allocate markets among themselves. In competitive reality, such an arrangement would be meaningless. The Topco members, dispersed in local markets across the country, were and continue to be concerned with survival and growth in the face of vigorous actual competition, particularly from the large national chains. (Findings 12, 13.)

14. The government contends the requirement that members be licensed to sell Topco branded products at wholesale is *per se* unlawful, yet the government admits that its complaint did not challenge these requirements (Juris. Statement, p. 7 n. 8, 14). When reference was made to wholesaling during trial by government counsel (during cross-examination of one of defendant's witnesses), Topco's counsel pointed out that the complaint did not attack these provisions. Judge Will noted: "I am sure if the record establishes that Mr. Morrison will ask leave to amend the complaint to conform the pleadings to the proof" (Tr. 314). The government however, never sought to amend its complaint although there was ample time to do so. Having failed to put this claim in issue in the district court, the government cannot now inject it as an issue for review. *See generally* Fed. R. Civ. P. 15(b); *Standard Title Insurance Co.* v. *Roberts*, 349 F. 2d 613 (8th Cir. 1965).

In any event, on the entire record before the district court, Judge Will concluded that the government failed to establish a violation

The district court's approach is a reflection of the continuing concern this Court has demonstrated regarding the market impact of competitive practices. Thus, in *United States* v. *Arnold, Schwinn & Co.*, 388 U. S. 365, 373-75 (1967), the Court examined the effect of Schwinn's outlet limitations upon the market:

> . . . The Government does not contend that a *per se* violation of the Sherman Act is presented by the practices which are involved in this appeal. . . . Accordingly, *we are remitted to an appraisal of the market impact of these practices.*
>
> In *White Motor Co.* v. *United States*, 373 U. S. 253 (1963), this Court . . . declined to outlaw the system because of the possibility that a trial laying bare "the economic and business stuff out of which these arrangements emerge" might demonstrate their reasonableness. *Id.*, at 263. *So here we must look to the specifics of the challenged practices and their impact upon the marketplace in order to make a judgment as to whether the restraint is or is not "reasonable"* in the special sense in which § 1 of the Sherman Act must be read for purposes of this type of inquiry.
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> * * * *
>
> Our inquiry is whether, assuming nonpredatory motives and business purposes and the incentive of profit and volume considerations, the *effect upon the market place is substantially adverse.* The promotion of self-interest alone does not invoke the rule of reason to immunize otherwise illegal conduct. It is *only if the conduct is not unlawful in its impact in the marketplace*

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of Section 1 of the Sherman Act (Conclusion of Law 5). The same reasons motivating the retail license provisions necessitated those concerning wholesaling. It has been Topco's policy (codified in a by-law) to grant licenses concerning wholesaling of Topco products to any Topco member who wishes to do so consistent with the maintenance of Topco's private brands for its members. (Conclusion of Law 4; Tr. 251-253.) *See Tripoli Co. Inc.* v. *Wella Corp.*, 425 F. 2d 932 (3d Cir. 1970), *cert. denied*, 400 U. S. 831 (1970).

> *or if the self-interest coincides with the statutory concern with the preservation and promotion of competition that protection is achieved. Chicago Board of Trade* v. *United States,* 246 U. S. at 238. (Emphasis added.)

The court concluded that Schwinn's restrictions controlling the resale of its manufactured products after it had already reaped the benefit of an outright sale were unlawful. These restrictions had a direct and substantial adverse impact upon the market to the detriment of the consumer. They benefited only Schwinn and were not ancillary to any legitimate business purpose.[15]

In contrast with *Schwinn,* Topco's licensing restrictions actually operate to promote rather than inhibit competition in the market. *See Tripoli Co., Inc.* v. *Wella Corp.,* 425 F. 2d 932 (3d Cir. 1970), *cert. denied,* 400 U. S. 831 (1970). The ultimate effect of the licensing provisions is to permit the continued operation of the cooperative which, in turn, benefits the consumer. (Opinion, pp. 10a, 11a; Conclusions of Law 3, 4.)

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15. That market impact is the central factor was confirmed by Mr. Justice Fortas' observation that such restrictions "may be permissible in an appropriate and impelling competitive setting. . . ." 388 U. S. at 379. The government, in its *Schwinn* brief, at 23, also recognized that:

> . . . If the practice has no anticompetitive effect at any level, the case is at an end. But even if there is an inhibiting effect, it may be offset by a procompetitive impact at another level, or it may be justifiable on other grounds compatible with the policies and objectives of antitrust law.

See also Albrecht v. *Herald Co.,* 390 U. S. 145, 154-56 (1968) (concurring opinion), *rehearing denied,* 390 U. S. 1018 (1968); *Janel Sales Corp.* v. *Lanvin Parfums, Inc.,* 396 F. 2d 398, 406 (2d Cir. 1968), *cert. denied,* 393 U. S. 938 (1968).

B. Topco Licensing Provisions Are Ancillary to a Pro-Competitive Purpose and Reasonably Related to Achieving That Purpose.

The concept of ancillary restraints had its origin in the common law where it was judicially employed to preserve economically desirable transactions otherwise prohibited as restraints of trade. *United States* v. *Arnold, Schwinn & Co.*, 388 U. S. 365, 392 (separate opinion). In *United States* v. *Addyston Pipe & Steel Co.*, 85 Fed. 271 (6th Cir. 1898), *aff'd*, 175 U. S. 211 (1899), Judge Taft recognized the common law doctrine as a fundamental Sherman Act principle and drew the basic distinction between those naked restraints unaccompanied by any purpose except the suppression of competition and covenants which are appurtenant to a primary and legitimate business purpose.[16] Such covenants are not unlawful if

> . . . merely ancillary to the main purpose of a lawful contract, and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party. 85 Fed. at 282.

See also Standard Oil Co. of N. J. v. *United States*, 221 U. S. 1, 49-60 (1911); *United States* v. *Joint Traffic Ass'n*, 171 U. S. 505, 568 (1898); *United States* v. *Trans-Missouri Freight Ass'n*, 166 U. S. 290, 329 (1897).

The courts have since continued to distinguish between agreements which are designed to restrict competition and those which do so only as an incident to the creation of new efficiencies. A broad range of competitive practices have

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16. The government states that a procompetitive purpose does not immunize an anticompetitive restraint (Juris. Statement, pp. 12-13). Topco never contended that it does; what Topco does contend is that consideration of the purpose of any competitive arrangement is the essential starting point in determining its effect and a crucial factor in evaluating its reasonableness.

been upheld under this ancillary restraints concept.[17] Indeed, this Court and lower courts have consistently refused to invoke the *per se* doctrine where the particular practice involved, when considered in the context of competitive reality, was reasonably related to the achievement of a legitimate purpose even though the practice was one traditionally included in the *per se* category. For example, while price-fixing agreements are generally regarded as *per se* illegal, *e.g., United States* v. *Socony Vacuum Oil Co.,* 310 U. S. 150 (1940), this Court in *Chicago Board of*

17. Exclusive market covenants among actual or potential competitors have been sustained under the ancillarity principle in joint venture cases: *United States* v. *Penn-Olin Chemical Co.,* 217 F. Supp. 110, 134-37 (D. Del. 1963), *vacated* (although the Court found no Section 1 violation on record), 378 U. S. 158 (1964), *remanded* (on Section 7 claim), 246 F. Supp. 917 (D. Del. 1965), *aff'd,* 389 U. S. 308 (1967); *United States* v. *Pan American World Airways, Inc.,* 193 F. Supp. 18 (S. D. N. Y. 1961), *rev'd on other grounds,* 371 U. S. 296 (1963); *United States* v. *National Malleable & Steel Castings Co.,* 1957 Trade Cas. ¶ 68,890 (N. D. Ohio 1957), *aff'd per curiam,* 358 U. S. 38 (1959). *See also United States* v. *Bausch & Lomb Optical Co.,* 45 F. Supp. 387, 398-99 (S. D. N. Y. 1942), *modified and aff'd,* 321 U. S. 707 (1944). The allocation of selling time among competitors has been repeatedly sustained under the same principle in the tobacco board cases. *See, e.g., Asheville Tobacco Board of Trade, Inc.* v. *FTC.,* 263 F. 2d 502 (4th Cir. 1959).

Other practices upheld under the doctrine include (a) joint selling and service agency agreements, *see, e.g., Appalachian Coals, Inc.* v. *United States,* 288 U. S. 344 (1933); *Parmelee Transportation Co.* v. *Keeshin,* 186 F. Supp. 533 (N. D. Ill. 1960), *aff'd,* 292 F. 2d 794 (7th Cir. 1961); (b) covenants not to compete, *see, e.g., Thomas* v. *Sutherland,* 52 F. 2d 592 (3d Cir. 1931); *Goldberg* v. *Tri-State Theatre Corp.,* 126 F. 2d 26 (8th Cir. 1942); *Tri-Continental Financial Corp.* v. *Tropical Marine Enterprises, Inc.,* 265 F. 2d 619 (5th Cir. 1959); (c) exclusive licensing, *see, e.g., Susser* v. *Carvel,* 206 F. Supp. 636 (S. D. N. Y. 1962), *aff'd,* 332 F. 2d 505 (2d Cir. 1964), *cert. dismissed,* 381 U. S. 125 (1965); *United States* v. *Paramount Pictures, Inc.,* 66 F. Supp. 323 (S. D. N. Y. 1946); (d) exclusive dealerships, *see, e.g., Bascom Launder Corp.* v. *Telecoin Corp.,* 204 F. 2d 331 (2d Cir. 1953), *cert. denied,* 345 U. S. 994 (1953); (e) territorial restrictions, *see, e.g., Sandura Co.* v. *FTC,* 339 F. 2d 847 (6th Cir. 1964); *Snap-On Tools Corp.* v. *FTC,* 321 F. 2d 825 (7th Cir. 1963).

Trade v. *United States,* 246 U. S. 231 (1918), held that a regulation restricting price-making was reasonable in view of its relation to a beneficial and legitimate purpose. More recently, in *United States* v. *Morgan,* 118 F. Supp. 621, 689 (S. D. N. Y. 1953), Judge Medina rejected the government's contention that agreements among investment bankers concerning security prices were *per se* illegal:

> . . . Despite all the general condemnation of price-fixing, I find nothing in any of these cases which can be regarded as controlling precedent here or which binds me to hold the clauses of these syndicate agreements now under attack to be illegal per se under the Sherman Act.
>
> We may accordingly, by an original and independent process, apply the rule of reason to the general methods used by the investment banking industry in making orderly distribution or placement of a new issue of securities on behalf of an issuer.

The agreement to maintain a fixed schedule of prices was found to be a reasonable concomitant of the entire underwriting operation which "serves a legitimate business and trade-promoting purpose."

In *United States* v. *National Football League,* 116 F. Supp. 319 (E. D. Pa. 1953), the government attacked a by-law of the National Football League prohibiting television broadcasting of certain games into specified areas as an allocation of marketing territories. The court rejected the *per se* approach urged by the government and found that the provision was essential to keep the weaker teams in fairly even competitive balance with the stronger teams, and probably essential to their very existence. Consequently, the restriction was lawful under the reasonableness standard of the Sherman Act:

> An allocation of marketing territories for the purpose of restricting competition . . . is not always il-

> legal. There is no formula "to displace the rule of reason by which breaches of the Sherman Law are determined. Nor is 'division of territory' so self operating a category of Sherman Law violations as to dispense with analysis of the practical consequences of what on paper is a geographic division of territory." 116 F. Supp. at 322.

As illustrated by these cases, the common law doctrine of ancillary restraints has been refined and distilled into a workable concept permitting the approval of competitively beneficial arrangements which necessarily involve some restrictions, while at the same time allowing application of a *per se* concept to strike down those arrangements which are inherently anticompetitive. A concise articulation of the concept, applied to uphold an exclusive licensing arrangement, is found in *United States* v. *Columbia Pictures Corp.*, 189 F. Supp. 153, 178 (S.D. N.Y. 1960):

> Where challenged conduct is subservient or ancillary to a transaction which is itself legitimate the decision is not determined by a *per se* rule. The doctrine of ancillary restraints is to be applied. It permits, as reasonable, a restraint which (1) is reasonably necessary to the legitimate purpose of the arrangement, and of no broader scope than reasonably necessary; (2) does not unreasonably affect competition in the market place; and (3) is not imposed by a party or parties with monopoly power.[18]

18. Another formulation of the ancillarity principle has been provided by Professor Robert H. Bork who states that market divisions among competitors will be upheld if:

> (1) the agreement accompanies a contract integration (the coordination of other productive or distributive efforts of the parties); (2) the agreement is ancillary to the contract integration (capable of increasing the integration's efficiency and no broader than required for that purpose); (3) the aggregate market share of the parties does not make restriction of output a realistic threat; and (4) the parties have not demon-

The district court correctly applied the principles of law concerning ancillary restraints and concluded that the Topco licensing system is subordinate to its procompetitive purpose, reasonably related to achieving that purpose and beneficial to the public interest (Conclusion of Law 4; Opinion, pp. 10a, 11a). These broader pro-competitive effects were summarized by the district court:

> In over-all economic effect, the Topco cooperative serves a legitimate pro-competitive purpose by (1) providing its members with commonly procured products to offer the consumer another choice of high quality, low price, private-label merchandise; (2) enhancing the ability of its members to compete more effectively in their respective markets against the stronger national and large chains; (3) enabling its members to exist as independently owned and operated businesses; and (4) benefiting the small manufacturers and processors which are the principal source of private label products (Conclusion of Law 3).

III. THE SPECIAL CIRCUMSTANCES OF THIS CASE MAKE AFFIRMANCE OF THE DISTRICT COURT'S JUDGMENT PARTICULARLY APPROPRIATE.

The district court's decision follows well-established and certain legal principles set forth by this Court from the earliest Sherman Act cases and consistently followed by lower federal courts. Further, the district court's decision is narrow in scope. It is limited not only in legal principle to the narrow rule of ancillary restraints, but is limited also in factual context to Topco's particular competitive role in the food retailing industry. The court's holding is

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strated that their primary purpose was the restriction of output.

Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, Part I, 74 YALE L. REV. 775 (1965); Part I 75 YALE L. Rev. 373, 474 (1966); *see also* Elman, *Petrified Opinions and Competitive Realities*, 66 COL. L. REV. 625 (1966).

clearly confined to "private labels" procured through a "cooperative buying organization" only when the members "could not otherwise obtain" the private labels and only where private labels "are essential to their effective competition with the national chains operating stores in their areas". (Opinion, pp. 10a, 11a.)

While convergence of such factors may not often occur in our economy, when they do occur, a *per se* rule as sought by the government here should not be permitted to stand as an unassailable barrier to the vigorous competition which can be offered through cooperative organizations such as Topco. Judge Will's opinion in this regard is particularly apposite:

> [T]he relief which the government here seeks would not increase competition in Topco private label brands but would substantially diminish competition in the supermarket field. The antitrust laws were certainly not intended to accomplish such a result. Only the national chains and the other supermarkets who compete with Topco members would be benefited. The consuming public obviously would not (Opinion, p. 11a).

CONCLUSION.

For these reasons judgment of the district court should be affirmed.

Respectfully submitted,

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March 1971.